Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

ADCO OIL COMPANY,

Petitioner,

v.

MICHAEL J. ROVELL,

Respondent.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent attorney represented petitioner as an individual partner of a partnership to investigate petitioner's potential malpractice claims against its former lawyer. Petitioner subsequently assigned "control" of those potential claims to its partnership, but it remained entitled to receive 20% of any returns from potential litigation exceeding partnership capital. Respondent undertook to represent both petitioner and its partnership simultaneously by filing litigation after petitioner's assignment. After filing suit, Respondent requested that petitioner sign an additional attorney-client engagement agreement with his firm which confirmed their representation of petitioner in the litigation as filed, and petitioner did sign it.

During the trial, but without petitioner's consent, the partnership authorized respondent to execute a contingent settlement which depended upon the jury verdict. The settlement guaranteed the partnership receive a minimum "low" $200,000 in bargain for limiting the maximum recovery "high" to $850,000. Respondent knew the guaranteed "maximum" was mathematically insufficient to entitle petitioner to recover upon its 20% of returns after investment interest in the litigation. Coincidentally, the "high-low" settlement happened also to guarantee respondent a minimum 30% contingent fee of the $200,000 minimum recovery, or $60,000. As a result of the jury verdict, the partnership received $515,000, respondent received $265,000, and petitioner received nothing.

When petitioner sued respondent in federal jurisdiction, the United States Court of Appeals for the Seventh Circuit denied petitioner recovery, not on the merits, but on the grounds that petitioner could not have suffered any injury since petitioner had assigned its litigation claims to its partnership. The court reasoned petitioner's injury had

only been derivative through its partnership, not direct, and since petitioner had not elected to sue derivatively, its suit was denied.

Petitioner respectfully requests that certiorari be granted on the following questions:

1. Did petitioner suffer direct personal injury to its legally protected interest (its contractual partnership right to receive 20% of returns in excess of investment from the litigation), even though it had assigned control of the underlying litigation to its partnership, and if so, was petitioner therefore entitled to bring its conflict of interest malpractice claim against respondent as a direct action in its own name, based upon their initial attorney-client engagement agreement executed *before* the assignment and the additional one executed *after* the assignment that confirmed respondent's duty to petitioner in the litigation?

2. Did petitioner suffer direct personal injury when, after the subject matter of representation between petitioner and respondent was complete, its respondent gave third parties an alleged false affidavit which they successfully used to defeat petitioner's separate lawsuit against them, and if so, was petitioner therefore entitled to bring its action for breach of the duty of trust claim against respondent as a direct action in its own name?

3. Does the instant case decision conflict with the United States Court of Appeals, Fifth Circuit, case of *In Re Yarn Processing Patent Validity Litigation, et al, v. Leesona Corporation*, 530 F.2d 83 (5th Cir. 1976), rehearing denied, 536 F.2d 1025 (1976) which holds that in an attorney-client conflict case, an assignee of the underlying subject matter of litigation (intellectual property) can not enforce

against the assignor's attorney the attorney-client obligations the attorney owed the assignor, because the assignment of the underlying subject matter of representation does not assign the rights and duties of the client's attorney, the relationship between an attorney and his client is personal, and in the absence of this relationship, the duties of loyalty do not arise.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings in the court of appeals.

ADCO Oil Company, the appellant in this matter, submits the following statement of its corporate interests and affiliations for the use of the judges of this Court:

1. The full name of every party or amicus the attorney represents in the case is ADCO Oil Company.
2. ADCO Oil Company is not a publicly-held corporation or other publicly-held entity.
3. ADCO Oil Company does not have any parent corporation.
4. No publicly-held companies own 10 percent or more of ADCO Oil Company's stock.
5. No other publicly-held corporation or other publicly-held entity has any direct, financial interest in the outcome of this litigation.
6. The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court are these:

   Ward & Glass, L.L.P, Law Offices of Mark J. Rose, and Winningham & Stein.

Date: ___ __, ____

Attorney's Signature: _____
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PETITION FOR WRIT OF CERTIORARI

ADCO Oil Company, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Seventh Circuit entered in this case on February 3, 2004, and February 26, 2004 respectively.

OPINIONS AND ORDERS BELOW

The opinion of the Seventh Circuit Court of Appeals which is sought hereby to be reviewed is reported at 357 F.3d 664 (7th Cir. 2004) The February 26, 2004, order of the Seventh Circuit denying the petition for panel rehearing is unreported.

That opinion, based upon an appeal from the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 2003 U.S. Dist. LEXIS 8352 (N.D. Ill. May 15, 2003).

That opinion was based upon an appeal from The United States Bankruptcy Court, Northern District of Illinois, Eastern Division, denying petitioner's motion for partial summary judgment and granting respondent's cross-motion for summary judgment, case No. 95 B 21171, *In Re Michael J. Rovell*, debtor.

BASIS FOR JURISDICTION IN THIS COURT

Federal bankruptcy law is the original source of subject-matter jurisdiction. See 28 U.S.C. § 1334(b). The United States Bankruptcy Court, Northern District of Illinois, Eastern Division, issued a Rule 58 final judgment. That judgment appealed from was "final" within

the meaning of 28 U.S.C. § 1291 because it disposed of all claims of all parties to this action.

On appeal, the United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction pursuant to 28 U.S.C. § 158(a)(1). On appeal, the Seventh Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The judgment of the United States Court of Appeals for the Seventh Circuit, the decision to be reviewed, was entered on February 3, 2004. A timely petition for panel rehearing was denied on February 26, 2004.

The jurisdiction of the Supreme Court to review on a writ of certiorari the judgment in question is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10(a), in that the Seventh Circuit Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved.

STATEMENT OF THE CASE
Factual Background

Petitioner ADCO Oil Company ("ADCO") developed intellectual property with the aid of its former attorney, Guy Taylor, et al. ADCO assigned that intellectual property to an Oklahoma general partnership named Hugoton Joint Venture-1986 (HJV) in exchange for project financing and the right to receive 20% of returns exceeding partnership investment, "payout." This

intellectual property constituted the entire purpose and scope of the HJV's business. The HJV was controlled by another partner. ADCO discovered its former attorney, Taylor, had destroyed the value of the intellectual property by improperly disclosing this confidential information to others.

ADCO retained respondent Michael J. Rovell ("Rovell") to investigate ADCO's potential litigation claims against Taylor. It is important to note only ADCO had ever had an attorney-client relationship with Taylor and his firm, so only ADCO owned a potential conflict of interest malpractice claim against target defendants. A few weeks later ADCO formally assigned control of its potential litigation claims against Taylor to HJV upon the same partnership terms—ADCO was entitled to receive 20% of returns from the litigation exceeding partnership investment of $1.1 million.

Later, Rovell filed the underlying litigation in Oklahoma state court on behalf of both ADCO and HJV, as co-plaintiffs against Taylor and Mobil Oil Company. Mobil settled for $250,000 before trial and was dismissed from the suit. During trial, Rovell allegedly injured ADCO by executing a contingent $850,000-$200,000 "high-low" settlement with the remaining Taylor defendants. The amount guaranteed to be paid to plaintiffs depended on whether the jury verdict was above, between, or below those amounts. Rovell knew this settlement would mathematically eliminate all possibility that ADCO could recover from the litigation, because according to the terms of the settlement, the maximum "high" recovery would be insufficient to exceed HJV's investment of $1.1 million. Thus there could never be any profits for ADCO to share from the litigation no matter what the jury verdict might be. The jury re-

turned its verdict in favor of ADCO for $100 million in actual damages and $20 million in punitive damages. According to the high-low settlement agreement, defendants paid the maximum $850,000 to plaintiffs. Rovell deducted his $265,000 contingency fee and costs and sent the balance of $585,000 to HJV. When HJV distributed the recovery from litigation to its partner investors, ADCO received nothing from the settlement because the total litigation proceeds from both Mobil and Taylor had failed to exceed investor "payout."

After the Taylor case was over, ADCO sued HJV and its controlling partner individually, in Oklahoma state court for breaches of fiduciary duty. ADCO's theory was that a fiduciary can not trade away his beneficiary's property in exchange for a personal benefit to himself at his beneficiary's expense: i.e., the controlling partner of HJV, as ADCO's fiduciary, could not properly authorize any settlement on terms which guaranteed the controlling partner at least a minimum litigation recovery if the terms of the settlement simultaneously guaranteed his beneficiary partner ADCO would receive nothing at all from the litigation settlement.

Of course this same legal theory also applied between Rovell and ADCO, because Rovell had a 30% contingency fee contract with HJV. Thus when Rovell executed the "high-low" settlement in the middle of the trial after he unsuccessfully sought ADCO's consent to same, he coincidentally had guaranteed himself, also as ADCO's fiduciary, a 30% contingent fee from the $200,000 minimum low settlement amount, $60,000.

Further, as a separate cause of action in the instant suit, ADCO contends Rovell breached his continuing duty of loyalty to ADCO *outside the time frame of the Taylor litigation*. After the Taylor litigation had been

completed, ADCO had filed suit against both HJV and its individual controlling partner for breaches of fiduciary duty in the Oklahoma state courts. ADCO lost this case by defendants' summary judgment which was affirmed on appeal. The Oklahoma appellate court affirmed specifically on the basis of the controlling partner's defense—that he had relied upon Rovell's legal advice to settle the Taylor suit, and ADCO had not rebutted the presumption that a partner acts in good faith if it acts upon the advice of a competent attorney. Rovell had given his personal affidavit to the defendants for their use as evidence to support their summary judgment motions in defense to ADCO's claims. Rovell was not an attorney of record for either party in that suit.

ADCO contends Rovell's affidavit was patently false.[1] ADCO cited common law authority for the proposition, "A breach of trust which arises out of the relationship, but occurs outside the time frame of the representation of plaintiff, could be a breach of fiduciary duty." The affidavit was allegedly false because it stated Stone had used absolute good faith in an attempt to maximize return for all Venturers, "including ADCO." Just the reverse is true. HJV had taken Rovell's suggestion and "capped" the maximum possible litigation recovery. Logically, HJV can not at the same time attempt to "maximize" the settlement by acting to *limit* the possible "high." This affirmation is a logical incongruity, and it is

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[1] "To my knowledge, Stone, on behalf of Hugoton Venture, Inc. as majority in interest of HJV, always followed my advice as legal counsel in these matters, acted consistent with his legal authority to do so, and always used absolute good faith in an attempt to maximize return for all Ventures, including ADCO."

false. Nevertheless, it was persuasive to the Oklahoma appellate court.

Neither the bankruptcy court, nor the district court, nor the Seventh Circuit Court of Appeals have ever mentioned, much less addressed, this false affidavit allegation of ADCO's.

IN THIS REVIEW OF A JUDGMENT OF A UNITED STATES COURT OF APPEALS, THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

As required by Rule 14(g)(ii), petitioner identifies federal bankruptcy law as the source of subject matter jurisdiction: 28 U.S.C. § 1334(b), because petitioner's original malpractice action against respondent has proceeded as an adversary action within bankruptcy after respondent filed a federal bankruptcy proceeding.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Court of Appeal's Decision Conflicts with a Decision from Another Circuit

These proceedings present a question of exceptional importance involving an issue on which the panel decision conflicts with an authoritative decision of another Circuit that has addressed the issue. The instant Seventh Circuit Court decision constitutes a fundamental attack on the principles stated in the Court of Appeals for the Fifth Circuit case of *In Re Yarn Processing Patent Validity Litigation, et al. v. Leesona Corporation*, 530 F.2d 83 (5th Cir. 1976), rehearing denied, 536 F.2d 1025 (1976).

In re Yarn involved a conflict of interest case wherein defendant did not have standing to raise the question of disqualification of a plaintiff's attorney who had been a former attorney of a co-defendant, which had been dismissed from suit, on claimed interest of its own arising out of asserted joint venture with dismissed defendant and assignment of a patent, since assignment of patent did not assign attorney along with it and defendant did not thereby receive assignment of any rights against the attorney. Applying the reasoning of that proposition to the instant case, the elements of standing required to have standing to disqualify an attorney should be the same elements of standing required in order for petitioner to be allowed to bring a malpractice action against its respondent directly in its own name, instead of derivatively through an assignee.

The instant court did not address the merits of ADCO's allegations. Instead it found ADCO is not entitled to recover against Rovell because since ADCO had transferred to HJV "whatever" interest it had in both the intellectual property and the ensuing claim against defendants, ADCO's injury was thus derivative rather than direct—HJV did not recover enough to call for a payout to ADCO, yet ADCO had elected to sue in its own name rather than make a derivative claim on behalf of HJV.

The Seventh Circuit's opinion incorrectly denied ADCO's recovery against Rovell for the following reasons:

The instant decision contradicts the proposition outlined in *In Re Yarn*, because if ADCO's assignment of control of its litigation (intellectual property) to HJV did not assign Rovell's existing duty owed to ADCO to avoid conflicting representation, then HJV would not be

allowed to bring an action against Rovell in its own name for breach of the duty Rovell owed ADCO. A decision consistent with *In Re Yarn* would hold Rovell's existing obligations owed ADCO can not be later asserted by HJV as a result of the assignment, because duties do not follow the assignment.

1. ADCO suffered direct, non-derivative, injury to its 20% of profits economic interest it retained after it had assigned its litigation claims to HJV partnership, because when Rovell executed the "high-low" settlement for HJV, that ended the entire litigation and at the same time extinguished all of ADCO's opportunity to recover from the litigation.

Before ADCO had assigned control of its claims to HJV, Rovell had a duty of loyalty to protect any interest ADCO may have had in the litigation because he had been retained to investigate precisely what ADCO's rights and claims were against Taylor defendants: "A client has the right to expect the loyalty of his attorney in the matter for which he is retained." The loyalty owed is the duty to avoid any conduct that would conflict with or be adverse to the client's interest. ADCO's legally protected interest was the 20% of returns in excess of investment retained interest it continued to own after its assignment of control of the litigation to HJV.

The Seventh Circuit decision acknowledged ADCO's right to receive this 20% share, if any, of litigation proceeds. Yet the court stated, "It is unclear to us that ADCO had any interest in the suit against Mobil and Taylor to start with. Once ADCO had sold its intellectual property rights to HJV in exchange for a partner-

ship interest, any injury caused by Taylor's errors was suffered by HJV rather than ADCO." (Seventh Circuit Opinion, p. 3) Here the court must be in error, because if ADCO continued to own *any* interest in the intellectual property following its assignment, that percentage interest would be the measure of ADCO's damages resulting from its former lawyers' malfeasance. ADCO's interest remained at 20% of returns in excess of partnership investment.

Also, if the court said that proposition was "unclear" to them, then that proposition is logically not the basis for the court's decision. Nevertheless, *In Re Yarn* applies here too, because the assignment of a patent (intellectual property) does not assign the rights against one's former attorney along with it. Therefore, Taylor could not have injured HJV by conflicting representation, because Taylor had no attorney-client relationship with HJV in developing that intellectual property. He owed HJV no duty of loyalty, and HJV could not have sued Taylor for breach of a duty he did not owe. Confirming this distinction, Rovell testified that in his opinion absent ADCO's assignment, HJV only had its own separate cause of action against Taylor for "fraud" which entitled them to receive damages for money HJV partners had invested and lost based upon Taylor's representations. Rovell testified only ADCO had the cause of action for the much larger damages.

The instant court followed, "But this is beside the point, for ADCO transferred to HJV *whatever interest* ADCO had possessed in the legal action against Mobil and Taylor." That is not precisely true, because it is undisputed ADCO retained its 20% of profits contractual interest in the litigation which had now become part of HJV's business by assignment. ADCO's assignment

came with strings attached, a remainder in the true sense. ADCO should not be required to sue Rovell derivatively through HJV for injury to a contractual right ADCO separately owned when it first retained Rovell.

The Seventh Circuit decision in the end states that "ADCO's only interest was, and is, as a partner of HJV, and its injury is derivative." (Seventh Circuit Opinion p. 4) There is nothing inconsistent with ADCO's being a partner of HJV, yet at the same time being injured by Rovell's subsequent representation of HJV in conflict with ADCO's interest. An attorney has a duty to protect its client's partnership interest, whatever it may be, if the attorney represents the partner individually, which Rovell did. That 20% was ADCO's legally protected interest, that Rovell had a duty not to injure, and that *was* injured by Rovell's guaranteed contingent settlement at HJV's, his second client's, instructions.

The Seventh Circuit stated, "The Oklahoma judiciary has concluded that whatever claim ADCO possessed was transferred to HJV. Legal ethics does not compel a lawyer to sabotage such transactions." (Seventh Circuit Opinion p. 4) [To explain this reference to the Oklahoma judiciary, in an earlier dispute between ADCO and HJV regarding whether or not ADCO's assignment to HJV was valid, Rovell had arranged to resolve the dispute between his co-clients by motion within the underlying litigation, allegedly representing HJV against ADCO by writing HJV's brief against ADCO on appeal in the process, but ADCO lost that issue. ADCO has not argued that alleged cause of action for purposes of this petition for writ of certiorari].

In response to the court's remarks above, ADCO contends the Oklahoma judiciary had finally determined

the issue between ADCO and HJV regarding who controlled the litigation. The Oklahoma court also granted that if HJV wanted, from its perspective, it could continue to retain Rovell to act in its behalf. Consequently, the Oklahoma court had determined issues between ADCO and HJV only. However, that court had not determined the issue of whether or not Rovell might have violated his duties owed to ADCO by his present or future conduct of the litigation on behalf of HJV. As a result, from ADCO's perspective, Rovell's duty to ADCO continued after the assignment, and indeed even after his representation of both co-plaintiffs in the litigation was completed.

2. When Rovell gave HJV a false affidavit for it to use to defeat ADCO's separate lawsuit against HJV and its controlling partner individually after the time frame of Rovell's representation of ADCO and HJV was over, ADCO suffered direct, not derivative, injury because the Oklahoma appellate courts relied upon Rovell's affidavit to deny ADCO's suit. The HJV partnership benefitted from the affidavit instead of being injured. Only ADCO suffered injury.

As mentioned in the factual background above, one of ADCO's original legal claims against Rovell was that he breached common law duties by offering HJV and its other partners a false affidavit which formed the basis the Oklahoma court used to dismiss the lawsuit ADCO had prosecuted against HJV and its majority partner after the Taylor litigation was over. In its brief to the Seventh Circuit Court, ADCO argued its "legally protected interest" giving it standing to sue Rovell was

ADCO's common law "expectation," arising from their former attorney-client relationship, that Rovell not provide a third party a misleading affidavit to use to defeat ADCO's separate action against the third party. None of the lower courts have ever addressed this alleged cause of action, and the Seventh Circuit did not either.

3. ADCO points out here the logical absurdities that would result if ADCO were required to bring its causes of actions against Rovell as a derivative action through the HJV partnership: (1) ADCO would have needed to argue in its derivative action that Rovell's allegedly false affidavit that enabled HJV to defeat ADCO's separate suit against it was in fact harmful to HJV even though it had served to win for HJV in its suit against ADCO; (2) if HJV were allowed to prosecute a derivative action on behalf of ADCO, it would have had to argue the inconsistent position that Rovell was ultimately liable for damages to HJV for executing the instructions its controlling partner had instructed him to execute; i.e., Rovell could defend by saying he was only following HJV's instructions.

ADCO hopes it is obvious by now that it entrusted its conflict of interest claims against Taylor to two fiduciaries, Rovell and HJV. They agreed between themselves, without ADCO's consent, to settle the litigation in a manner which guaranteed both of themselves at least a minimum recovery (Rovell 30% contingency fee of $200,000 and HJV the remainder), while the same settlement guaranteed ADCO get nothing, even though ADCO was their common beneficiary.

Rovell and his law firm had requested ADCO sign an additional written engagement agreement after ADCO's

assignment of its litigation to HJV and after the litigation had been filed on behalf of co-clients. Rovell cautioned ADCO's president that he would be personally liable for the hourly fees billed upon this agreement for the first time, and the agreement specifically stated it confirmed Rovell's firm's continued representation of ADCO in the specified litigation. The bankruptcy court opinion acknowledged the existence of that second engagement agreement as an undisputed fact.

In hindsight, considering the instant case holding that ADCO did not have any standing to sue Rovell for a continuing duty of loyalty to avoid conflicts arising from this second confirming attorney-client agreement, the agreement seems to have been a particularly sinister request; for evidently in spite of ADCO's president's personal liability for the fees, that engagement agreement was not worth the paper it was written on, allowing no direct action by ADCO.

CONCLUSION

For the foregoing reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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